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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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AUG 16 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food manufacturer. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 22, 2008 denial, at issue in this case is whether the petitioner has had the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 14, 2004. The proffered wage as stated on the Form ETA 750 is $18.36 per hour ($38,188.80 per year). The Form ETA 750 indicates that the position requires a bachelor's degree in Accounting or the foreign equivalent degree.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The evidence in the record shows that the petitioner is structured as a C corporation. According to information provided on the petition, the petitioner was established in 1997 and it currently employs 40 workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on February 24, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Here, the petitioner presented what it claims to be pay stubs of paychecks paid to the beneficiary during the relevant period. However, there is no evidence in the record of any cancelled paychecks associated with these stubs. Also, there are no payroll records from the petitioner against which to compare these stubs so that the authenticity of the pay stubs can be confirmed. Thus, it is not clear from the record whether the petitioner paid beneficiary the amounts stated on these pay stubs. The AAO finds that these pay stubs are not reliable evidence and are not probative in this matter. The petitioner also submitted 2004, 2005, 2006 and 2007 Forms W-2, Wage and Tax Statement, which indicate that the petitioner paid the beneficiary a portion of the proffered wage during 2004 through 2006, and that, in 2007, the petitioner paid the beneficiary the full proffered wage. The Forms W-2 in the record state the following:

- The 2004 Form W-2 states that the petitioner paid the beneficiary $23,350 in 2004, or $14,838.80 less than the proffered wage.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- The 2005 Form W-2 states that the petitioner paid the beneficiary $25,525 in 2005, or $12,663.80 less than the proffered wage.
- The 2006 Form W-2 states that the petitioner paid the beneficiary $28,854.80 in 2006, or $9,334 less than the proffered wage.
- The 2007 Form W-2 states that the petitioner paid the beneficiary $38,188.80 in 2007, or the proffered wage exactly.

Thus, the petitioner has established the ability to pay the proffered wage in 2007 through actual wages paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the relevant period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 6, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet available. The 2007 tax return need not be analyzed here as the petitioner has already shown an ability to pay the wage in that year. The petitioner's tax returns demonstrate its net income for 2004 through 2006, as shown in the table below.[2]

- The 2004 Form 1120 states net income (loss) of -$53,014.
- The 2005 Form 1120 states net income (loss) of -$4,813.
- The 2006 Form 1120 states net income (loss) of -$174,097.

In all three years 2004 through 2006, the petitioner took a loss. Therefore, during these years, the petitioner did not have sufficient net income to cover the proffered wage, or to cover the difference between the wage it paid the beneficiary in those years and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 through 2006, as shown in the table below.

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[2] The petitioner's 2003 tax return is in the record. This return is not analyzed in this section as it covers the period just before the May 14, 2004 priority date. The 2003 tax return will be considered later in this discussion, as will the 2007 tax return, when reviewing the totality of the petitioner's financial circumstances.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The 2004 Form 1120 states net current assets (liabilities) of -$99,970.
- The 2005 Form 1120 states net current assets (liabilities) of -$285,325.
- The 2006 Form 1120 states net current assets (liabilities) of -$343,524.

In the years 2004 through 2006, the petitioner had negative net current assets. Thus, it did not have sufficient net current assets to cover the proffered wage or the difference between the actual wages paid the beneficiary in those years and the proffered wage.

In sum, for the year 2007, the petitioner has established that it had the ability to pay the wage. It has not shown an ability to pay the wage in 2004 through 2006 through an examination of wages paid to the beneficiary, its net income or net current assets.

On appeal, counsel seems to indicate that where a petitioner demonstrates that it has paid the beneficiary the part-time, annual wage required under the terms of an H1B nonimmigrant visa in place at the time of the priority date on the Form I-140 until the time that the beneficiary adjusts to lawful permanent resident status, then USCIS should find that it has shown an ability to pay the wage in the Form I-140 proceeding. This is not correct. The wage required under the terms of the beneficiary's H1B visa is not relevant to these proceedings. The petitioner must demonstrate an ability to pay the full proffered wage on the Form ETA 750 as certified ($38,188.80) from the priority date onwards. *See* 8 C.F.R. § 204.5(g)(2). If it is not able to do so, USCIS must deny the petition.

Counsel also indicates that the Service Center has established that if the petitioner has paid or is currently paying the beneficiary the proffered wage, then the petitioner has established an ability to pay the proffered wage from the priority date onwards. Counsel suggests that the record reflects that the petitioner is currently paying the proffered wage or more and thus has shown the ability to pay from 2004 onwards. This is not correct. First, counsel seems to have taken this phrase "has paid or is currently paying the beneficiary the proffered wage" from a memorandum dated May 4, 2004 from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay ("2004 Yates Memo"). USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Also, as noted previously, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Counsel may not interpret language from the May 4, 2004 Yates memorandum as granting the petitioner the right to sidestep this regulatory requirement by showing that the petitioner is currently paying the beneficiary the proffered wage. The AAO must examine whether the petitioner has shown an ability to pay the proffered wage from the priority date onwards, and dismiss the appeal if it has not. The AAO would add that the only evidence in the record regarding the wages currently being paid the beneficiary during 2008, at the time of filing the appeal, is a set of pay stubs. As noted previously, the pay stubs in the record are not reliable evidence and are not probative in this matter.

In addition, counsel suggested that loans to the petitioner included at Line 18 of the petitioner's Schedules L in the record represent loans from the petitioner's owner that were not repaid within a year. As such, counsel indicated that these funds are not current liabilities but are instead long-term liabilities; thus, they should not be considered part of the net current assets analysis. Counsel submitted, in support of these points, a letter written by a Certified Public Accountant (CPA) in which the CPA indicated: that loans from the petitioner's owner should be reclassified under long-term liabilities; that the Schedule L of the petitioner's tax returns should be amended accordingly; and that these amended taxes should be filed with the Internal Revenue Service (IRS). Counsel went on to recalculate net current assets in this matter with the loans to the petitioner no longer considered as current liabilities. The AAO rejects these assertions.

First, where the petitioner relies upon any financial statements, whether prepared by a CPA or another entity, to show an ability to pay the wage, those statements must be audited. *See* 8 C.F.R. § 204.5(g)(2). Unaudited financial statements are the representations of management. The unsupported representations of management are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, Line 18 of the Schedule L is titled "other current liabilities." Thus, the AAO considers Line 18 of the Schedule L to represent current liabilities, not long-term liabilities as suggested by the petitioner's CPA. As such, this office must consider these funds when determining the petitioner's net current assets. Regarding the amended tax returns submitted on appeal, if the petitioner decides to file amended tax returns with the Internal Revenue Service (IRS), which reflect different entries on the Schedules L or elsewhere, after submitting its original tax returns into the record, this office will only utilize the information on the amended returns if the petitioner provides certification from the IRS that the returns were filed with that agency.

Counsel and the petitioner's owner also indicated that the AAO should look to the assets of petitioner's owner as funds that are available to pay the proffered wage. This is not correct. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

USCIS will also consider the overall magnitude and circumstances of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined

that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the petitioner states on the petition that it was established in 1997 and that it currently employs 40 workers. The petitioner has not established its historical growth since incorporating. Its gross receipts have fluctuated somewhat during 2003 through 2007 as follows: $2,375,211 in 2003; $2,662,849 in 2004; $2,731,389 in 2005; $2,691,578 in 2006; and $3,607,111 in 2007. During 2003 through 2007, the total wages paid its employees have been relatively modest, as follows: $58,075 in 2003; $170,186 in 2004; $129,660 in 2005; $131,913 in 2006; and $206,411 in 2007. Also, the petitioner paid no officer compensation during 2003 through 2007. Finally, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has had the continuing ability to pay the proffered wage from 2004 onwards.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.